[redacted]

(33,576)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 267

ITHACA TRUST COMPANY, SOLE SURVIVING EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF EDWIN C. STEWART, DECEASED, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Petition for writ of certiorari	a	1
Record from Court of Claims	1	5
Petition	1	5
Exhibit "A"—Will	12	13
Exhibit "B"—Letters testamentary	17	18
General traverse	18	18
Argument and submission	18	18
Special findings of fact	19	19
Conclusion of law	21	22
Opinion, Graham, J	22	22
Judgment	24	25
Proceedings after entry of judgment	24	26
Clerk's certificate (omitted in printing)	25	
Order allowing certiorari		27

[fol. 1]

IN THE SUPREME COURT OF THE UNITED STATES

ITHACA TRUST COMPANY, Sole Surviving Executor and Trustee under the Last Will and Testament of Edwin C. Stewart, Deceased, Petitioner and Plaintiff,

vs.

THE UNITED STATES, Defendant

PETITION FOR WRIT OF CERTIORARI

The decision of the Court of Claims herein was rendered the 20th day of February, 1928. Plaintiff's motion for a new trial was overruled by said Court on the 28th day of May, 1928.

Your petitioner respectfully shows and petitions this Court as follows:

1. At the time of the commencement of this suit your petitioner was and still is the Sole Surviving Executor and Trustee under the Last Will and Testament of Edwin C. Stewart, deceased, being a corporation organized and existing under the laws of the State of New York.

2. This suit was brought by your petitioner to recover Federal Estate Taxes erroneously and illegally assessed against and collected from it as Executor of the Estate of said Edwin C. Stewart, deceased.

[fol. 2] 3. The decedent, Edwin C. Stewart, died a resident of Ithaca, in the State of New York, and by his Will made certain bequests to his trustee in trust exclusively for charitable, religious and public purposes. The Commissioner, however, refused to allow the Executor to make any deduction for such bequests, and upon review and audit of the Federal Estate Tax Return, assessed and collected additional Estate taxes from your petitioner because of the inclusion in the net estate of the value of such bequests.

The deductibility of charitable, religious, etc., bequests is governed by the Revenue Act of 1918, (said decedent having died June 15, 1921), and said Act allowed as deductions:

"The amount of all bequests, legacies, devises, or gifts * * * to any State * * * any subdivision thereof * * * for exclusively public purposes * * * or to a trustee or trustees exclusively for such religious, scientific, charitable, literary or educational purposes. * * * (Sec. 403 (a) (3) Rev. Act of 1918). * * * The Executor shall also, at such time * * * as may be prescribed by regulations made pursuant to law, file * * * a return * * * setting forth (a) the value of the gross estate of the decedent at the time of his death * * *; (b) the deductions allowed in Section 403; (c) the value of the net estate of decedent, as defined in Section 403; * * *." (Sec. 404 id).

Article 77 of Regulations 37 prescribed:

"A return on Form 706 is required * * *. It must be filed within one year after the date of death unless an extension is had * * *."

Under the construction given the above by the Commis- [fol. 3] sioner, the Executor was not permitted to deduct the amount of the charitable and like bequests in testator's Will. The executor paid the additional estate tax and brought this suit to recover the amount by which the estate tax would be reduced had deductions of such bequests been allowed.

4. The charitable and like bequests contained in testator's Will were as follows:

The testator bequeathed his entire residuary estate of $347,244.51 to the use of his wife for life with the added provision, "I also authorize my wife, Annie L. Stewart, to use any additional sum necessary to suitably maintain her in as much comfort as she now enjoys." Upon the death of the wife the entire residuum (with the exception of $35,000) was to fall to trustees for the exclusive use of charitable and like institutions enumerated in Section 403 of the Act of 1918, supra.

Decedent's widow died December 12, 1921, less than six months after the death of decedent, having received and been credited with $10,110.04 income from the residuum, and the amount to be paid to charitable and like institu-

tions was definitely ascertainable prior to the date of the computation of the Federal Estate Tax. The income from the estate was at decedent's death, and at all times during [fol. 4] the life of the widow in excess of the sum necessary, in the absence of unusual circumstances, to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of the testator.

(Finding XIII.)

5. The executor contended, in the alternative:

(a) That the full amount paid to charitable and like institutions under the Will was deductible, as such amount was definitely ascertained within the period prescribed by the statute and the regulation for the ascertainment of the amount of charitable and like bequests and other deductions.

(b) That the full residuum (less $35,000) was deductible, less the value of the widow's life estate: (1) The actual value as same was ascertainable prior to date of computation of the tax; or (2) the arbitrary value as derived by the mortuary tables prescribed by the Treasury Department of the United States.

6. The Court of Claims refused to allow the deductions of said bequests, giving as its reason for so holding:

"* * * Without entering into a discussion of what limitations there were, if any, on expenditure by the life tenant 'to suitably maintain her in as much comfort as she now enjoys,' it is evident that the failure of investments, the diminution of income, the high cost of living, and the changing ideas of what constitutes comfort might well absorb a good part, and possibly all, of the principal sum and leave no balance for charity, and that a contingency permeates the gifts to charity which may prevent any of [fol. 5] them from ever going into possession and enjoyment * * *."

7. Your Petitioner respectfully submits that: (a) the bequests gave to charities, etc. a vested estate in testator's residuum; that the statute allowed such bequests to be treated as deductions; and that the death of the life tenant made the value of such bequests (the amount of such deduction) definitely ascertainable within the time prescribed

by the Statute and the regulation, for the ascertainment of such and other deductions; (b) the bequests gave to charities vested remainders subject to divesture upon a possibility too remote to properly be given the effect of depriving such bequests of any substantial value. And for estate tax purposes that value was ascertainable and allowable.

8. Your petitioner submits that the question of the proper construction of the Revenue Act of 1918 is one of public importance; that the Circuit Court of Appeals for the Fifth Circuit has decided one of the questions herein involved contra to the decision of the Court of Claims in the instant case; and the question should be passed upon by this Court.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Court of Claims of the United States, commanding the said Court to certify and send to [fol. 6] this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Court of Claims of the United States in the case entitled Ithaca Trust Company, Sole Surviving Executor and Trustee Under the Last Will and Testament of Edwin C. Stewart, deceased, vs. The United States, No. F-82, to the end that said case may be reviewed and determined by this Court as provided in the Judicial Code, or that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

Ithaca Trust Company, By R. V. H. Lyon, Simon Lyon, Attorneys for said Petitioner.

[fol. 1] IN THE UNITED STATES COURT OF CLAIMS

No. F-82

ITHACA TRUST COMPANY, Sole Surviving Executor and Trustee Under the Last Will and Testament of Edwin C. Stewart, Deceased, Plaintiff,

vs.

THE UNITED STATES, Defendant

I. PETITION—Filed Feb. 26, 1926

To the Honorable, the Chief Justice and the Judges of the United States Court of Claims:

Your Petitioner, the Ithaca Trust Company, as sole surviving executor and trustee under the Last Will and testament of Edwin C. Stewart, deceased, respectfully represents:

[fol. 2] I

That it is a corporation duly organized and existing under the laws of the State of New York.

II

That on the 24th day of February, 1919, the President of the United States approved an act entitled "An Act to provide revenue, and for other purposes" (40 Stat. L. 1057), Sections 401, and 402 of Title IV of said Act provided for the assessment and collection of certain "Estate Taxes" upon and from the estates of resident decedents. (Amendments by the Revenue Act of 1921, 42 Stat. L. 227; and by the Revenue Act of 1924, — Stat. L. 253, are not material to the issues of this case.)

The material portion of said Section 401 is as follows:

"Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the

net estate (determined as provided in Section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States;

"1 per centum of the amount of the net estate not in excess of $50,000;

"2 per centum of the amount by which the net estate exceeds $50,000 and does not exceed $150,000;

"3 per centum of the amount by which the net estate exceeds $150,000 and does not exceed $250,000;

* * * * * * *

[fol. 3] "Sec. 403. That for the purpose of the tax the value of the net estate shall be determined—(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * * * *

(There is no dispute as to deductions provided in Subdivisions (1) and (2).)

"(3). The amount of all bequests, legacies, devices, or gifts, to or for the use of the United States, any State, Territory, any subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of estates of all decedents who have died since December 31, 1917, and

"(4). An exemption of $50,000."

III

That heretofore, to wit, on the 9th day of June, 1922, Edwin C. Stewart, then in life, being a citizen of the United States, and a resident of the City of Ithaca, State of New York, duly executed and acknowledged his last will and testament, a certified copy of same being filed herewith

marked "Claimant's Exhibit A" and prayed to be read and considered as a part of this petition. That the material portions of said last will and testament are the twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth, paragraphs thereof, which are in words and figures as follows:

[fol. 4] "Twelfth. I give unto my beloved wife, Annie L. Stewart, of Ithaca, New York, the use for her natural life, of all the rest, residue and remainder of my property, real, personal and mixed of which I may die seized, with full authority to sell and dispose of any real estate of which I may die seized, for such figures as she may, in her judgment, deem for the best interest of my estate. I also authorize my wife, Annie L. Stewart, to use any additional sum from the principal of my estate that may be necessary to suitably maintain her in as much comfort as she now enjoys. I request my wife, Annie L. Stewart, from the said income of my estate, to give annually, a sum sufficient in her judgment for the maintenance of my cousin, Grace L. Ely, of West Allenhurst, New Jersey.

"Thirteenth. At the death of my wife, Annie L. Stewart, of Ithaca, New York, from the balance of my estate, I direct my Executors, hereinafter named, to pay unto the trustees of East Lawn Cemetery, the sum of Ten thousand dollars ($10,000).

"Fourteenth. I give unto the Ithaca Trust Company of Ithaca, New York, from the funds in the hands of my Executors, hereinafter named, the sum of Twenty-five thousand dollars ($25,000). In trust nevertheless, for the following uses and purposes: To invest and re-invest as it deems for the best interest of this Trust, the interest to be paid semi-annually to the Trustees of the East Lawn Cemetery of Ithaca, New York, said interest to be used by the said Trustees or their successors:

"I. For the good and suitable upkeep of my lot in said Cemetery.

"II. The balance to be expended by them for the upkeep of the said Cemetery.

"Fifteenth. From the balance of my estate at the death of my wife, I give unto the Union Benevolent Society, of [fol. 5] Ithaca, New York, Seventy-five thousand dollars

($75,000), in trust nevertheless, for the following uses and purposes: To establish The Stewart Memorial Fund, as an Endowment Fund, the income from which shall be used for the maintenance of "The Home," at Ithaca, New York.

"Sixteenth. From the balance of my estate at the death of my wife, I give unto the Trustees of the First Presbyterian Church, of Ithaca, New York, the sum of Twenty-five thousand Dollars ($25,000), in trust nevertheless, for the following uses and purposes: To invest and re-invest as they deem for the best interest of this Trust, the income therefrom to be used for the benefit of the First Presbyterian Church, of Ithaca, New York; this Fund to be in memory or my mother, A. Louisa Stewart.

"Seventeenth. From the balance of my estate at the death of my wife, I give unto the Board of Trustees of the Ithaca Hospital, of Ithaca, New York, the sum of One hundred thousand Dollars ($100,000), in trust nevertheless for the following uses and purposes: To invest and re-invest as it deems for the best interest of this Fund, the interest to be used for the maintenance of the Ithaca City Hospital, the principal to be maintained as the Stewart Endowment Fund.

"Eighteenth. From the balance of my estate at the death of my wife, I give unto the Ithaca Trust Company, of Ithaca, New York, in trust nevertheless, all the rest, residue and remainder of my estate, to invest and re-invest as it deems for the best interest of this Trust, the interest to be paid semi-annually for a period of ten years, for the improvement of Renwick Park, at Ithaca, New York, and at the end of said ten years, the balance of my estate not hereinbefore specifically expended or otherwise trusteed, I [fol. 6] direct to be expended for the permanent improvement of said Renwick Park, under the direction of the Directors of the Ithaca Trust Company, as they in their judgment shall deem best."

IV

That the said Edwin C. Stewart departed this life on, to wit, the 15th day of June, 1921, without having revoked or modified the aforementioned last will and testament, and the same was duly admitted to probate and record in the

Surrogate's Court of Tompkins County, New York, as and for the last will and testament of the said Edwin C. Stewart. That your petitioner duly qualified as executor and trustee thereunder; and on the 9th day of August, 1921, letters testamentary on the estate of the said Edwin C. Stewart were duly granted unto Annie L. Stewart, his widow, and your petitioner; as will more fully appear by reference to a certificate of the Surrogate's Court of Tompkins County, New York, herewith filed, marked "Claimant's Exhibit B," and prayed to be read and considered a part of this petition.

That the said widow Annie L. Stewart, departed this life on, to wit, the 12th day of December, 1921, approximately six months after the date of death of decedent, leaving your petitioner the sole surviving executor and trustee of the estate of the said Edwin C. Stewart, deceased.

That your petitioner is still executor and trustee as aforesaid, its authority as such never having been modified or revoked; as will more fully appear by reference to the Certificate of the Surrogate's Court of Tompkins County, New York, above mentioned.

That your petitioner has strictly complied with all the [fol. 7] terms of and directions contained in said last will and testament.

V

That your petitioner, on or about August 9, 1921, as executor of the estate of the said Edwin C. Stewart, deceased, in compliance with the provisions of the Revenue Act of 1918, *supra*, duly made and filed an estate tax return in writing, with the Collector of Internal Revenue of the 21st District of the State of New York, and paid to said Collector, as such executor, $1,020.64 as and for estate taxes due from said estate.

That on or about December 24, 1924, the then Collector of Internal Revenue for the 21st District of the State of New York, acting for and on behalf of the United States, and assuming to act as such under the provisions of the Act of Congress approved February 24, 1919, as amended, collected, over its protest, from your petitioner as executor as aforesaid, the further sums of $11,498.82 and $735.82 (interest), claiming the same to be lawfully due under said Act. Making the total sum collected from your petitioner,

as aforesaid, Thirteen Thousand Two Hundred Seventy-three Dollars and Twenty-eight Cents ($13,273.28).

VI

That on or about the 10th day of April, 1925, your petitioner filed an application in the Treasury Department, praying for and demanding the refundment of all of said moneys, collected from it as aforesaid.

Although said application was in all respects complete, regular and in accordance with the law and regulations, was accompanied by all the necessary evidence and proof of facts, which facts were not traversed or denied by [fol. 8] the Commissioner of Internal Revenue nor by any other representative of the United States, nevertheless, on, to wit, the 17th day of July, 1925, the Secretary of the Treasury of the United States, rejected and denied said application (as shown by the records of the Office of the Hon. Commissioner of Internal Revenue, Treasury Department, which are prayed to be read and considered a part of this petition), and has continuously declined and now declines to pay to your petitioner the moneys asked and demanded by the said application.

VII

That the said Annie L. Stewart, widow of said decedent, was, on the date of death of the said testator, sixty-one (61) years of age; and that the said widow departed this life on, to wit, the 12th day of December 1921, approximately six months after the date of death of the said testator.

That for many years prior to the death of said Edwin C. Stewart, testator, he and his widow, Annie L. Stewart, lived in Ithaca, New York, in a simple and unpretentious style; and that the income from the estate of the said testator was, at his death, and during the life of the widow, in excess of the sum necessary to "suitably maintain her in as much comfort as she now enjoys."

VIII

That the aforementioned Collector of Internal Revenue and the Hon. Commissioner of Internal Revenue, in as-

sessing and collecting the moneys from your petitioner as aforesaid, held that estate taxes were assessable and collectible upon the entire estate of said Edwin C. Stewart, without the allowance of any deduction whatsoever of charitable, educational or public bequests (set forth above), [fol. 9] as provided by Section 403 (a) (3), supra.

In figures the statement of the Honorable Commissioner of Internal Revenue is as follows:

Gross estate determined including charitable, public and similar bequests returned $347,244 51		$507,557 12
Deductions (other than under 403 (a) (3))		82,070 73
Total net estate determined		$425,486 39
Tax determined	$12,519 46	
Interest	753 82	
Total paid	$13,273 28	

IX

That your petitioner is advised by counsel and therefore avers that the entire tax paid is refundable for the reason that the entire estate was paid to charitable, public, and educational, etc., institutions, the said widow having died within one year from the date of death of testator—that is, prior to the expiration of the legal period of administration.

X

Your petitioner is advised by counsel, and therefore avers, that if the entire tax be not refundable, then, in the computation of estate tax legally due, it was and is entitled, under Section 403 (a) (3) of the Revenue Act of 1918, supra, to the deduction of the value as of the date of death of testator, of the remainders bequeathed to the charitable, public, religious, and similar institutions; and that a proper computation of the tax would be as follows:

[fol. 10] Total Gross Estate			$507,557 12
Deductions 401 (a) (1) and 401 (a) (4)		$82,070 73	
Value of property to widow for life remainder to charitable, etc., institutions	$347,244 51		
Less life estate to widow (61 yrs. @ 4%)	126,329 64		
Value of Remainders to charitable etc., institutions		$220,914 87	
Total deductions			$302,985 60
Net estate taxable			$204,571 52
Tax on above		$4,137 15	
Less $1,026.64 paid with return, Balance $3,116.51 Interest on $3,116.51 to December 14, 1924		204 95	
Total tax as per above		$4,342 10	
Tax and Interest paid		13,273 28	
Refundable with interest from date of payment		$8,931 18	

XI

No action upon this claim, other than that hereinbefore set forth, has been taken before the Congress or any of the departments of the United States Government.

XII

That your petitioner has at all times borne true allegiance to the Government of the United States, and it has not in any way abetted or given encouragement to rebellion against the said Government.

Your petitioner avers that there is justly due and owing to it from the United States, on account of the matters

herein set forth, the sum of thirteen thousand two hundred and seventy-three dollars and twenty-eight cents ($13,273.28), after deducting all just setoffs or demands on the part of the United States, together with interest at the rate of six (6) per centum per annum from the date of the pay-[fol. 11] ments of the alleged taxes; that your petitioner is the sole owner of the claim herein sued upon, and no assignment or transfer of the said claim or any part thereof, or any interest therein, has been made.

Wherefore, your petitioner prays judgment against the United States in the sum of thirteen thousand two hundred and seventy-three dollars and twenty-eight cents ($13,273.28), together with interest at the rate of six (6) per centum per annum from the respective dates of payment of the alleged taxes.

Ithaca Trust Company, by Lyon & Lyon, Attorneys for Plaintiff.

City of Washington,
District of Columbia, ss:

Personally appeared before me, a Notary Public, in and for the District of Columbia, R. B. H. Lyon, who being duly sworn according to law, deposes and says, that he is a member of the firm of Lyon & Lyon, and that he is duly authorized to make oath in this cause by virtue of power of attorney herewith filed, and that he has read and understands the foregoing petition, and that the facts therein set forth are true in substance and fact as he is informed and believes.

R. B. H. Lyon.

Subscribed and sworn to before me, a Notary Public, this 26th day of February, A. D. 1926. George W. Smith, Notary Public, D. C.

[fol. 12] Claimant's Exhibit A to Petition

State of New York,
Tompkins County,
Surrogate's Office, ss:

I do hereby Certify, that I have compared the annexed copy of the last Will and Testament of Edwin C. Stewart,

deceased, with the original record thereof in this office, and that the same is a correct transcript therefrom, and of the whole of said original Record. Said will was probated on the 9th day of August, 1921.

In Witness Whereof, I have hereunto set my hand and caused the Official Seal of the Surrogate's Court of Tompkins County to be hereunto affixed, at Ithaca, in said County, this 18th day of January, in the year 1926.

D. M. Gillespie, Clerk of Surrogate's Court. (Seal.)

Last Will and Testament

I, Edwin C. Stewart, of the City of Ithaca, in the County of Tompkins and State of New York, being of sound mind and memory, do make, publish and declare this my last Will and Testament, in manner following, that is to say:

First. I direct the payment of all my just debts and funeral expenses.

Second. I give unto my beloved wife, Annie L. Stewart, formerly Annie L. Post, of Ithaca, New York, the sum of Fifty thousand Dollars ($50,000); also my home at 125-127 East Buffalo Street, Ithaca, New York, my cottage and all other property at McKinney's and my boat-house property on Westport Street, Ithaca, New York, together with all the furniture, furnishings and all equipment therein severally contained, including my automobiles and motor boat.

Third. I give unto Ford D. Whiting, of Ithaca, New York, fifty (50) shares of stock of D. B. Stewart & Co., Inc., par value of one hundred dollars ($100) each.

[fol. 13] Fourth. I give unto Lewis C. Perry, of Ithaca, New York, fifty (50) shares of stock of D. B. Stewart & Co., Inc., par value of one hundred dollars ($100) each.

Fifth. I give unto Gardiner M. Rogers, of Ithaca, New York, fifty (50) shares of stock of D. B. Stewart & Co., Inc., par value of one hundred dollars ($100) each.

Sixth. I give unto my uncle, Olin L. Stewart, of Ithaca, New York, one hundred (100) shares of stock of D. B. Stewart & Co., Inc., par value of one hundred dollars ($100) each.

Seventh. I give unto my cousin, Minnie C. Gray, of Brooklyn, New York, the sum of Five Thousand Dollars, ($5,000).

Eighth. I give unto my cousin, J. Livingston Ely, of El Paso, Texas, the sum of one thousand dollars, ($1,000).

Ninth. I give unto my friend, Benjamin F. Milks, of Ithaca, New York, the sum of one thousand dollars ($1,000).

Tenth. I give unto every person, who is either in my employ or that of D. B. Stewart & Co., Inc., at the date of my death and who shall have been in the regular employ of myself or D. B. Stewart & Co., Inc., or its predecessor, D. B. Stewart & Company, for a total period of ten (10) years, the sum of five Hundred Dollars ($500) except that there is excluded from the gift provided for in this paragraph, each person hereinbefore specifically or individually provided for in this Will.

Eleventh. I give unto every other person, who is either in my employ or that of D. B. Stewart & Co., Inc., at the date of my death, and who shall have been in the regular employ of myself or D. B. Stewart & Co., Inc., for a period of one year, the sum of One Hundred Dollars ($100) each, except that there is excluded from the gift provided for in this paragraph, each person hereinbefore specifically or individually provided for in this Will.

[fol. 14] Twelfth. I give unto my beloved wife, Annie L. Stewart, of Ithaca, New York, the use for her natural life of all the rest, residue and remainder of my property, real, personal and mixed of which I may die seized, with full authority to sell and dispose of any real estate of which I may die seized, for such figures as she may, in her judgment, deem for the best interest of my estate. I also authorize my wife, Annie L. Stewart, to use any additional sum from the principal of my estate that may be necessary to suitably maintain her in as much comfort as she now enjoys. I request my wife, Annie L. Stewart, from the said income of my estate, to give annually a sum sufficient in her judgment for the maintenance of my cousin, Grace L. Ely, of West Allenhurst, New Jersey.

Thirteenth. At the death of my wife, Annie L. Stewart, of Ithaca, New York, from the balance of my estate, I direct my Executors, hereinafter named, to pay unto the trustees of East Lawn Cemetery, the sum of Ten Thousand Dollars ($10,000).

Fourteenth. I give unto the Ithaca Trust Company, of Ithaca, New York, from the funds in the hands of my

Executor hereinafter named, the sum of Twenty-five thousand dollars ($25,000) in trust nevertheless, for the following uses and purposes: To invest and re-invest as it deems for the best interest of this Trust, the interest to be paid semi-annually to the Trustees of the East Lawn Cemetery of Ithaca, New York, said interest to be used by the said Trustees or their successors.

I. For the good and suitable upkeep of my lot in said Cemetery.

II. The balance to be expended by them for the upkeep of the said Cemetery.

Fifteenth. From the balance of my estate at the death of my wife, I give unto the Union Benevolent Society, of Ithaca, New York, seventy-five thousand dollars ($75,000). In trust nevertheless, for the following uses and purposes: To establish The Stewart Memorial Fund, as an Endow-[fol. 15] ment Fund, the income from which shall be used for the maintenance of "The Home," at Ithaca, New York.

Sixteenth. From the balance of my estate at the death of my wife, I give unto the Trustees of the First Presbyterian Church, of Ithaca, New York, the sum of Twenty-five thousand dollars (25,000), in trust nevertheless, for the following uses and purposes: To invest and re-invest as they deem for the best interest of this Trust, the income therefrom to be used for the benefit of the First Presbyterian Church, of Ithaca, New York; this fund to be in memory of my mother, A. Louisa Stewart.

Seventeenth. From the balance of my estate at the death of my wife, I give unto the Board of Trustees of the Ithaca City Hospital, of Ithaca, New York, the sum of One hundred thousand dollars ($100,000), in trust nevertheless for the following uses and purposes: To invest and re-invest as it deems for the best interest of this Fund, the interest to be used for the maintenance of the Ithaca City Hospital, the principal to be maintained as the Stewart Endowment Fund.

Eighteenth. From the balance of my estate at the death of my wife, I give unto the Ithaca Trust Company, of Ithaca, New York, in trust nevertheless, all the rest, residue and remainder of my estate, to invest and re-invest as it deems for the best interest of this Trust, the interest to be paid semi-annually for a period of ten years, for the

improvement of Renwick Park, at Ithaca, New York, and at the end of said ten years the balance of my estate not hereinbefore specifically expended or otherwise trusteed, I direct to be expended for the permanent improvement of said Renwick Park, under the direction of the Directors of the Ithaca Trust Company, as they in their judgment shall deem best.

Nineteenth. I authorize my Executors and Trustee herein designated, to act without Bond.

Twentieth. I direct my Executors that it is my wish and [fol. 16] will that my estate pay all taxes and that each and every gift herein made shall be net to the devisee.

Lastly, I hereby appoint my wife, Annie L. Stewart of Ithaca, New York, and the Ithaca Trust Company of Ithaca, New York, Executors of this my last Will and Testament; and hereby appoint the Ithaca Trust Company, of Ithaca, New York, to be Trustee of each and every Trust created in this Will for which a Trustee is not hereinbefore named.

In witness whereof, I have hereunto subscribed my name the 9th day of June, in the year One thousand nine hundred and twenty-one.

Edwin C. Stewart. (L. S.)

We, whose names are hereto subscribed, do certify that on the 9th day of June, 1921, Edwin C. Stewart, the testator above named, subscribed his name to this instrument in our presence and in the presence of each of us, and at the same time, in our presence and hearing, declared the same to be his last will and testament, and requested us and each of us, to sign our names thereto, as witnesses to the execution thereof, which we hereby do in the presence of the testator and of each other, on the day of the date of the last Will, and write opposite our names our respective place of residence.

Geo. S. Tarbell, residing at Ithaca, N. Y. Arthur D. White, residing at Ithaca, N. Y.

[fol. 17] CLAIMANT'S EXHIBIT B TO PETITION

The People of the State of New York to all to whom these presents shall come or may concern:

Know ye, that at Ithaca, in the County of Tompkins, State of New York, on the 9th day of August, 1921, Letters Testamentary, upon the Last Will and Testament of Edwin C. Stewart, late of the city of Ithaca, in said County, deceased, were duly granted and issued by the Surrogate's Court of the County of Tompkins, to Annie L. Stewart of the City of Ithaca, N. Y., Ithaca Trust Company of the City of Ithaca, N. Y. Executors in said Will named and that the same are still in force and unrevoked as to Ithaca Trust Company, who is the sole surviving executor of said estate.

In testimony whereof, We have caused the seal of our said Surrogate's Court to be hereunto affixed. Witness, Hon. Willard M. Kent, Surrogate of our said County, at Ithaca, this 18th day of January, A. D., 1926.

D. M. Gillespie, Clerk of the Surrogate's Court.
(Seal.)

[fol. 18] II. GENERAL TRAVERSE—Filed Apr. 27, 1926

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.
F. K. D.

III. ARGUMENT AND SUBMISSION

On January 25, 1928, this case was argued and submitted on merits by Mr. Alex. F. Prescott, Jr., for plaintiff, and by Mr. J. H. Sheppard, for the defendant.

IV

[fol. 19] **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Graham, J.**—Filed Feb. 20, 1928.

This case having been heard by the Court of Claims upon a stipulation of facts signed on behalf of plaintiff by its attorneys Lyon & Lyon and on behalf of defendant by Assistant Attorney General Herman J. Galloway, the court adopts said stipulation as its

Special Findings of Fact

I

The plaintiff, the Ithaca Trust Company, is a corporation duly organized and existing under the laws of the State of New York, and is fully empowered to administer estates and execute trusts.

II

On June 9, 1921, one Edwin C. Stewart, then in life, being a citizen of the United States and a resident of the city of Ithaca, State of New York, duly executed and acknowledged his last will and testament, a copy of which, marked "Exhibit A," is attached to the petition and made a part hereof by reference.

III

The said Edwin C. Stewart departed this life on June 15, 1921, without having revoked or modified the aforementioned last will and testament, and the same was duly admitted to probate and record in the surrogate's court of Tompkins County, New York, as and for the last will and testament of the said Edwin C. Stewart, deceased. The plaintiff duly qualified as executor and trustee thereunder, and on August 9, 1921, letters testamentary on the estate of the said Edwin C. Stewart were duly granted unto Annie L. Stewart, his widow, and the plaintiff. The said widow, Annie L. Stewart, departed this life on December 12, 1921, leaving the plaintiff the sole surviving executor and trustee

of the estate of the said Edwin C. Stewart, deceased. The plaintiff is still executor and trustee as aforesaid, its authority as such never having been modified or revoked.

IV

The said widow, Annie L. Stewart, was born on May 27, 1860.

[fol. 20] V

On June 14, 1922, the plaintiff, as executor of the estate of the said Edwin C. Stewart, deceased, made and filed an estate tax return, in writing, with the collector of internal revenue for the 21st district of the State of New York, and paid to said collector an estate tax of $1,020.64.

VI

On April 29, 1924, the plaintiff filed a claim for refund of $32.35 of the tax of $1,020.64 paid on June 14, 1922, as set forth above.

VII

On March 27, 1924, on review and audit, the Commissioner of Internal Revenue found due an additional estate tax in the sum of $11,911.42.

VIII

On April 24, 1924, the plaintiff filed a claim for abatement of the additional tax of $11,911.42 set forth above in Finding VII.

IX

On December 8, 1924, the Commissioner of Internal Revenue rejected said claim for refund of $32.35, and allowed said claim for abatement to the extent of $412.60.

X

On December 24, 1924, plaintiff paid an additional estate tax of $11,498.82, with interest in the sum of $753.82.

XI

On April 13, 1925, plaintiff filed a claim for refund of $12,252.64, which was rejected by the Commissioner of Internal Revenue on July 17, 1925.

XII

The total amount actually paid and accrued to the widow, Annie L. Stewart, and her estate, as legatee under the last will and testament of Edwin C. Stewart, deceased, was as follows:

Specific bequest, $50,000.00.

Income from decedent's death to widow's death, $10,110.04.

XIII

For many years prior to the death of said Edwin C. Stewart, he and his widow, Annie L. Stewart, lived in Ithaca, New York, in a simple and unpretentious style, spending each year less than the income produced by the estate of the said testator; and the income from the estate [fol. 21] of said testator was, at his death, and during the life of the widow, in excess of the sum necessary to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of said testator. After the payment of debts and the specific legacies, the estate produced an income in excess of the sum necessary, in the absence of unusual circumstances, to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of the said testator.

XIV

The value of the entire residuum of the estate was at date of said testator's death $347,244.51. The value of a life estate in $347,244.51 to a person sixty-one years of age (as shown by the mortuary tables prescribed by the Treasury Department of the United States) is $126,329.64.

XV

The following institutions named as legatees in the said last will and testament of Edwin C. Stewart, deceased, are

either political subdivisions of a State or corporations organized and operated for religious, charitable, scientific, literary, or educational purposes, no part of the net earnings of which inures to the benefit of any stockholder or individual, or trustees for such purposes, namely:

Union Benevolent Society of Ithaca, New York.

"The Home" of Ithaca, New York.

Trustees of the First Presbyterian Church, of Ithaca, New York.

First Presbyterian Church, of Ithaca, New York.

Board of trustees of the Ithaca City Hospital, of Ithaca, N. Y.

Ithaca City Hospital, of Ithaca, New York.

Ithaca Trust Co., as trustee for Renwick Park, at Ithaca, New York.

Renwick Park, at Ithaca, New York.

XVI

No action upon this claim, other than that herein set forth, has been taken before the Congress or any of the departments of the United States Government. The plaintiff is sole owner of the claim sued upon, and no assignment or transfer of the same, or any part thereof, or any interest therein, has been made. The plaintiff has at all times borne true allegiance to the Government of the United States, and it has not in any way abetted or given encouragement to rebellion against the said Government.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition should be, and it is, dismissed.

Judgment is rendered against the plaintiff for the cost of printing the record in this cause, the amount thereof to be ascertained by the clerk and collected by him.

[fol. 22] Opinion

Graham, Judge, delivered the opinion of the court:

This is an action to recover a sum paid as an additional estate tax on the estate of Edwin C. Stewart. It involves

the question whether by the terms of the will of said Stewart a residuary estate to charitable purposes following a life estate should be taxed as part of the net estate of the decedent at his death. The provision of the will involved is as follows:

"Twelth. I give unto my beloved wife, Annie L. Stewart, of Ithaca, New York, the use for her natural life of all the rest, residue, and remainder of my property, real, personal, and mixed of which I may die seized, with full authority to sell and dispose of any real estate of which I may die seized, for such figures as she may, in her judgment, deem for the best interest of my estate. I also authorize my wife, Annie L. Stewart, to use any additional sum from the principal of my estate that may be necessary to suitably maintain her in as much comfort as she now enjoys. I request my wife, Annie L. Stewart, from the said income of my estate, to give annually, a sum sufficient in her judgment for the maintenance of my cousin, Grace L. Ely, of West Allenhurst, New Jersey."

The question raised is whether under the will the plaintiff, as executor, was entitled to deduct from the gross estate of decedent at his death the full value of the residuary legacy. The Goverment contended that it could not, but must account for the tax on the same as part of the gross estate, in conformity with the provisions of the applicable statute.[1] It has been held that what was taxed by the

[1] The applicable sections of the revenue act of 1918, 40 Stat. 1096, 1098, are as follows:

"Sec. 401. That (in lieu of the tax imposed by Title II of the revenue act of 1916, as amended, and in lieu of the tax imposed by Title IX of the revenue act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or nonresident of the United States."

Sec. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident by deducting from the value of the gross estate—

(3) The amount of all bequests, legacies, devises, or gifts to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917.

statute was not the interest to which the legatees and devisees succeeded on the death but the interest which ceased by reason of death. Y. M. C. A. v. Davis, 264 U. S. 47, 50; Edwards v. Slocum, Id. 61. In the case of Mitchell et al. v. United States, 63 C. Cls. 613, it was held that the revenue act applicable here, authorizing deductions from the gross estate of the amount of all bequests or gifts to a trustee, exclusively for religious or charitable purposes, applied only to bequests or gifts intended to take effect "upon the testator's death or upon the happening of an event that will certainly occur," and that if the contingency upon which the bequest was to go to charitable purposes was such that the bequest might never become effective in possession or enjoyment, there was no authority under the statute for a deduction of the amount, or its ascertained value, from the gross estate.

[fol. 23] In the present case it will be seen that the use during her natural life of all of the estate was given to decedent's wife, and authority to sell and dispose of any of the real estate as in her judgment she might deem for the best interest of the estate, and to use "any additional sum from the principal of my estate that may be necessary to suitably maintain her in as much comfort as she now enjoys." The will further provides that "from the balance of my estate at the death of my wife I give" in trust certain named sums for charitable and religious purposes.

It is clear that what is given for charitable and religious purposes is the "balance" of the estate at the death of the life tenant, whatever that "balance" might be. The life tenant had not only the use of the personal property, but the right to dispose of the real estate at her discretion and to use as much of the principal as would enable her to live in the comfort described in the will.

Without entering into a discussion of what limitations there were, if any, on expenditure by the life tenant "to suitably maintain her in as much comfort as she now enjoys," it is evident that the failure of investments, the diminution of the income, the high cost of living, and the changing ideas of what constitutes comfort might well absorb a good part, and possibly all, of the principal sum and leave no balance for charity, and that a contingency permeates the gifts to charity which may prevent any of

them from ever going into possession and enjoyment. The gifts for charitable and religious purposes, therefore, did not take effect upon the death of the testator or upon the happening of an event which would certainly occur, and consequently, within the meaning of the statute, could not be deducted from the gross estate. In this view of the case, the plaintiff is not entitled to recover.

This is a grant of a privilege by the Government and is to be construed in favor of the grantor. Hannibal, etc., R. R. Co. v. Missouri River Packet Co., 125 U. S. 260, 271; Swan v. Finch Co., 190 U. S. 143, 146; and Cornell v. Coyne, 192 U. S. 418, 431. This construction of the statute has been the uniform practice of the Treasury Department having in charge its execution, which should carry weight with the court. United States v. Moore, 95 U. S. 760, 763; Schell's Executors v. Fauché, 138 U. S. 562. But, more than this, it is in conformity with the regulations of the Treasury Department promulgated under the authority of the Secretary of the Treasury, which has the effect of law when reasonably adapted to the enforcement of the act and not in conflict with statutory provisions. United States v. Birdsall, 233 U. S. 223, 231; United States v. Small, 236 U. S. 405, 409, 411; United States v. Morehead, 243 U. S. 607; and Maryland Casualty Co. v. United States, 251 U. S. 342, 349.

The petition should be dismissed, and it is so ordered.

Moss, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

[fol. 24] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 20th day of February, A. D. 1928, judgment was ordered to be entered as follows:

Upon special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition should be, and it is, dismissed.

Judgment is rendered against the plaintiff for the cost of printing the record in this cause, the amount thereof to be ascertained by the Clerk and collected by him, according to law, the amount of which is $45.10.

VI. Proceedings After Entry of Judgment

On April 18, 1928, the plaintiff filed a motion for a new trial.

On May 28, 1928, the court entered the following order on said motion:

Order

It is ordered this 28th day of May, 1928, that the plaintiff's motion for new trial be and the same is overruled.

By the court.

Fenton W. Booth, Ch. J.

[fol. 25] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 33,576. Court of Claims. Term No. 267. Ithaca Trust Company, sole surviving executor and trustee under the last will and testament of Edwin C. Stewart, deceased, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed July 13th, 1928. File No. 33,576.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 15, 1928

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.